IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

TUESDAY, THE 5TH JUNE 2007 / 15TH JYAISHTA 1929

WP(C).No. 14132 of 2005(G)

AGAINST THE ORDER DATED 22/03/05 IN IA.95 of 2005 IN OS.339/2004 of PRL.SUB COURT,IRINJALAKUDA

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PETITIONER:

M.K. GOVINDANKUTTY MENON,
S/O. MADATHIKULANGARA RAVUNNY MENON,
(RETIRED DISTRICT JUDGE), RESIDING AT MADATHUMPADY DESOM, MADATHUMPADY VILLAGE,
KODUNGALLUR TALUK.

BY ADV. SRI.K.P.SREEKUMAR

RESPONDENTS:

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1. REENA, W/O. LATE KAITHACHIRAYIL ARAKKAL THOMAS, MANANCHERY DESOM, PUTHENCHIRA VILLAGE, PARAVUR TALUK.

2. RINTO (MINOR) S/O. LATE KAITHACHIRAYIL ARAKKAL THOMAS, IN DO. DO. REPRESENTED BY GUARDIAN MOTHER REENA, THE 1ST RESPONDENT.

3. THOMAS @ LINTO (MINOR) S/O. LATE KAITHACHIRAYIL ARAKKAL THOMAS, IN DO. DO. REPRESENTED BY GUARDIAN MOTHER REENA, THE 1ST RESPONDENT.

4. RAMACHANDRAN, S/O. DIVAKARAN NAIR, PUTHUPALLIYATH, MADATHUMPADY VILLAGE, KODUNGALLUR TALUK.

5. KOCHUPAILO, S/O.ERIYADU PADAYATTI OUSEPH, MANACHERI DESOM, PUTHENVELIKKARA VILLAGE, PARAVUR TALUK.

6. SOJAN, S/O. KOCHUPAILO,
PUTHENVELIKKARA VILLAGE, PARAVUR TALUK.

7. GOURI, W/O. CHAKKUMKUMARATH
HARI MENON, VELUKKARA VILLAGE,
MUKUNDAPURAM TALUK.

R4 & R7 BY ADV. SRI.RAJESH VIJAYAN
R1 TO R3 BY ADV.SRI.V.BINOY RAM
R5 & R6 BY ADV.SRI.V.B.UNNIRAJ

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 05/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P.(C)14132/05

Appendix

PETITIONER'S EXTS:

EXT.P1 – TRUE COPY OF APPLICATION FOR ATTACHMENT TOGETHER WITH AFFIDAVIT AND SCHEDULE IN I.A.95/05 FILED BY RESPONDENTS 1 TO 3.

EXT.P2 – TRUE COPY OF THE COUNTER AFFIDAVIT FILED BY PETR. AND OTHERS IN I.A.95/05 FILED BY RESPONDENTS 1 TO 3 HEREIN

EXT.P3 – TRUE COPY OF ORDER DT.22.3.05 PASSED BY THE LOWER COURT IN I.A.95/05

/TRUE COPY/

PIUS C. KURIAKOSE, J.

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W.P.(C)No.14132 OF 2005

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DATED THIS THE 5TH JUNE, 2007

J U D G M E N T

In this Writ Petition under Article 227 of the Constitution, the petitioner, a retired member of the State Higher Judicial Service impugns Ext.P3 order passed by the learned Subordinate Judge on an application for attachment before judgment filed by respondents 1 to 3 who were plaintiffs in a suit for damages suffered by them due to the death of one Thomas, husband of the 1st respondent and father of respondents 2 and 3, by electrocution. The allegation in the plaint was that live electric wire had been laid by respondents 4 to 7 who were defendants 3 to 6 in the suit on the boundary of the property belonging to the petitioner who was the 1st defendant in the suit, so as to protect the cultivations standing thereon from attack of rats, bandicoots, rabbits, wild boars etc. The ridge over which the live electric wire was laid was being used by various persons of the locality to the knowledge of all the defendants and it is contended that the instruction given by the writ petitioner-1st defendant to the 2nd defendant, allegedly his agent to lay live electric wire was an

intentional negligent act; and the petitioner vicariously and the other defendants directly are liable for payment of damages. The contention raised by the petitioner in the suit inter alia was that it was not he who was cultivating the property and that the property in question had been leased out by him to the 2nd defendant who only was cultivating the same, engaging the other defendants, all of them agricultural workers. Accordingly it was contended that the petitioner is not at all liable for damages or any other claim made in the suit, and that the suit as instituted against him is not maintainable. Initially the suit was filed in forma pauperis and while the indigent O.P. was pending, I.A.No.2810 of 2003 seeking attachment of several items of properties including that of the petitioner was filed. The allegation in that I.A. was that the petitioner is going to execute a transfer deed in respect of the residential properties which are shown as item 1 in the schedule in favour of his son. To the I.A., the petitioner filed a counter affidavit categorically stating that he has no intention at all to execute any deed in favour of his son or anybody else. Attachment was not granted and the indigent O.P. itself was dismissed on 18.4.2004. It is thereafter that court fee was remitted and the present suit was registered. In the present suit, I.A.No.95 of 2005 seeking attachment

under Order XXXVIII Rule 5 C.P.C. of the very same properties was filed. Hereagain, the allegation in the affidavit in support of the application so far as the same related to the petitioner's property was that he is attempting to create documents in favour of his son and wife. Ext.P1 is copy of the application for attachment and the affidavit in support thereof. To Ext.P1, the petitioner filed Ext.P2 counter affidavit wherein it is clearly averred that there is no proposal whatsoever to alienate the property as alleged in Ext.P1. It is stated in the counter affidavit that if the petitioner had any such intention he could have effected the transfer as soon as the Pauper O.P. was dismissed. The petitioner has undertaken through the counter affidavit that he shall not alienate the properties in question and it is declared therein that he has no intention at all to defeat any prospective decree which may be passed against him.

2. Despite the contentions in Ext.P2, the learned Subordinate Judge has taken the view that the merits of the suit claim need not be gone into at this stage. Holding that a prima facie case for attachment of property has been made out, the court has passed an order directing the petitioner and each of the other defendants in the suit to furnish security for Rs.4,25,000/- on or before 5.4.2005, failing which

all properties shall be attached. Ext.P3 is copy of the said order. It is to quash Ext.P3 that the present Writ Petition has been filed raising various grounds.

3. I have heard the submissions of Sri.K.P.Sreekumar, learned counsel for the petitioner, Sri.Binoy Ram V., learned counsel for respondents 1 to 3, Sri.Rajesh Vijayan, learned counsel for respondents 4 and 7 and Sri.V.B.Unniraj, learned counsel for respondents 5 and 6.

4. Mr.K.P.Sreekumar would submit that the learned Sub Judge did not notice the distinction between attachments before judgment under Order XXXVIII Rule 5 and those in execution. Attachments before judgment under Order XXXVIII Rule 5 are issued with the objective of preserving the property belonging to the defendant for the satisfaction of a decree which may be passed in favour of the plaintiff. In proceedings for such attachments, what the court is expected to do is only to ensure that property is not disposed of by the defendant pending suit. The affidavit sworn to by the petitioner was quite convincing and it was highly improper on the part of the learned Sub Judge to have ignored the undertakings in the affidavit and insisted on the petitioner submitting security for the entire plaint claim.

Mr.Sreekumar would also submit that the impugned order is per se tainted with a jurisdictional error. The plaint claim was only around Rs.4 lakhs and under the impugned order, the defendants together have been called upon to furnish security for a total amount of Rs.22 lakhs.

5. The learned counsel for respondents 1 to 3 would submit that the petitioner does not have to be worried about the attachment order since it is only a conditional order of attachment which is now passed. It is open to the petitioner to avoid attachment by furnishing the security presently ordered by the Subordinate Judge.

6. Having considered the rival submissions made at the Bar, I am of the view that the learned Sub Judge was not justified in ignoring the undertaking which had been given by the writ petitioner to the court through the counter affidavit. The learned Subordinate Judge, I am afraid, did not notice the distinction between attachments before judgment issued under Order XXXVIII Rule 5 and attachments in execution issued under Order XXI Rule 54. Attachments before judgment are issued with the objective of preserving the property belonging to the defendant concerned so that in the event of a positive decree being passed in favour of the plaintiff, he will be able to

proceed against that property for securing the fruits of the decree. While issuing such attachments, the court only ensures that the defendant does not dispose of the property pending suit. As noticed by the Supreme Court in **Govindrao Mahadik v. Devi Sahai** (AIR 1982 SC 989), the sole object behind the order of attachment before judgment "is to give an assurance to the plaintiff that his decree if made would be satisfied. It is a sort of guarantee against decree becoming infructuous for want of property available from which the plaintiff can satisfy the decree". This is why attachments before judgment are always liable to be lifted the moment the defendant furnishes security. On the contrary, attachment in execution is a step in execution and such attachments are often readily granted and such attachments are not liable to be lifted on furnishing security. In the instant case, before proceeding to attach the property belonging to the petitioner, the learned Subordinate Judge should have considered whether the apprehension of the plaintiffs that the petitioner will alienate his properties was well founded and also as to whether there was sufficient guarantee that the properties of the petitioner will be available for the plaintiffs to proceed against in the event of the plaintiffs being able to obtain a positive decree against the petitioner

also. Even the learned Sub Judge has not chosen to say that the contention raised by the petitioner regarding maintainability of the suit does not merit any consideration. Even assuming that the suit is maintainable against the petitioner, then also, the maximum that would happen is that along with the fellow-defendants in the suit a decree for the plaint claim will be passed against him also. The counter affidavit refers to an identical motion for attachment before judgment of the very same properties by respondents 1 to 3 and the rejection of that motion by the court. The defence of the petitioner to that motion also was that he has no intention whatsoever to transfer his properties in favour of his son and that he will not transfer the property at all till such time as the suit is disposed of. The truth of his statement stands vindicated by his subsequent conduct of retaining the property in his own name till respondents 1 to 3 file the present application for attachment before judgment. Ext.P2 counter affidavit contains a clear and unambiguous undertaking by the petitioner to the effect that he shall not alienate the property in question and that under no circumstances a situation of the plaintiffs being unable to secure the fruits of the prospective decree on account of transfer by the petitioner of his property will arise. The attention of the court is drawn in Ext.P2

to the circumstance that true to his assurance given through the earlier affidavit, he did not dispose of the properties even though the indigent O.P. itself was dismissed. It is not disputed before me by the learned counsel appearing for the contesting respondents that while in judicial service the petitioner was known for his integrity. I am unable to understand why the learned Sub Judge did not accept the undertaking given by the petitioner through Ext.P2 counter affidavit and absolve the the petitioner from the embarrassment of an order of attachment being passed against the immovable properties standing in his name. The learned Sub Judge has not given any reason as to why he is not prepared to accept the undertaking given by the petitioner through Ext.P2. I do not see any reason why the undertakings given by the petitioner should not inspire confidence in the mind of the learned Sub Judge. In this Court also, Sri.K.P.Sreekumar, counsel has reiterated the undertakings of the petitioner given through Ext.P2. I record the submissions of the learned counsel in that regard.

7. There is a still better reason as to why the supervisory jurisdiction under Article 227 should be invoked on Ext.P3. The plaint claim is below Rs.4 lakhs. Under Ext.P3, the learned Sub Judge has specifically directed each of the defendants to furnish security for

Rs.4,25,000/-. The total security thus secured for the plaintiff under Ext.P3 is for Rs.22 lakhs. Though Order XXXVIII Rule 5 enables the court to direct the defendant to furnish security in such sum as may be specified in the order, I have no doubt at all that it will be excessive and erroneous exercise of jurisdiction if a court insists on production of security far in excess of the prospective decree-debt.

8. In the result, I set aside Ext.P3 to the extent directions are issued against the petitioner. I however record and accept the undertaking given by the petitioner in Ext.P2 counter affidavit which he has filed, which is to the effect that the property sought to be attached will not be disposed of by him.

The Writ Petition is allowed as above. No costs.

(PIUS C. KURIAKOSE, JUDGE)

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